Gill v Trenerry [1999] NTSC 133

PARTIES:	GILL, Brian John
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA70/99
DELIVERED:	7 December 1999
HEARING DATES:	19 November 1999
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL AND NEW TRIAL

Interference with discretion of court below – appeal against sentence – whether separate offences are all part of a single criminal enterprise – presumption of concurrency of sentence.

R v Scanlon (1987) 89 FLR 77, applied.
Attorney-General v Tichy (1982) 30 SASR 84, applied.
R v Bird (1988) 56 NTR 17, considered.

STATUTES

Acts of Parliament – operation and effect of statutes – *Sentencing Act* 1995 (NT) s 50 and s 51 – presumption of principle of concurrency – discretion of court to be exercised judicially when departing from presumption of concurrent sentencing.

Sentencing Act 1995 (NT) s 40, s 50, s 51 and s 54
R v Scanlon (1987) 89 FLR 77, applied.

REPRESENTATION:

Counsel:

Appellant:	D Conidi
Respondent:	J Adams

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

Judgment category classification:	C
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Mar99040

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gill v Trenerry [1999] NTSC 133
No. JA70/99

BETWEEN:

BRIAN JOHN GILL
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 7 December 1999)

[1] Appeal against sentence. The appellant was convicted upon his pleas of guilty before the Court of Summary Jurisdiction at Darwin to 35 counts of stealing, contrary to s 210 of the *Criminal Code,* and 35 counts of falsifying documents, contrary to s 233(b). The maximum penalty for each offence is seven years imprisonment.

[2] The sentence of the Court was that he be imprisoned for two years on the stealing charges and six months on the others, of the six months, three months was ordered to be served concurrently with the former term. A non-parole period of 14 months was fixed after his Worship said he had turned his mind to suspending some of the sentence or adopting that alternative.

The non-parole period is a little in excess of the minimum prescribed of 50% of the head sentence.

[3] The facts relating to the offences may be broadly summarised as follows. The appellant was employed as a sales manager of a used car business, Freedom Motors. When a customer purchases a vehicle from the company a Form 10 contract is required under the *Consumer Affairs and Fair Trading Act* (1990) NT, made out with the customer's details, the details of the vehicle, the date of purchase, the purchase price and the amount of any deposit or trade in. A copy of the form is given to the customer and the original retained at Freedom Motors. The banking and accounting system was that when a vehicle was sold, the appellant was required to deliver a photocopy of the form to the accounts section along with all monies paid by the customer. The first two offences occurred on about 18 April 1998 when a customer purchased a motor vehicle from Freedom Motors paying $1,000 cash as a deposit. A Form 10 was correctly completed by the appellant, but he subsequently stole the $1,000 and delivered a photocopy of the form to the accounts personnel showing no cash deposit having been paid, and instead adding $1,000 to the value of the trade-in. A variation occurred on about 18 August 1998 when a customer purchased a motor vehicle for $6,500 cash. The Form 10 was completed by the appellant, but he concealed the existence of that form from his employer and failed to account for the money. Over a period of approximately 12 months the appellant stole $70,090, largely employing the method described, but after one of the

transactions had accounted for $5,000. Apart from the direct financial loss, a Victim Impact Statement from Freedom Motors shows that the organisation was put to a great deal of additional expense and trouble in maintaining its existing financial arrangements and investigating and checking records. That company also has a substantial contingent liability to the finance company which finances purchasers of motor vehicles if any of them should default because the information supplied to the financier upon the basis of the documents which the appellant prepared and altered were false.

[4] The amended grounds of appeal assert that the sentence was manifestly excessive, that his Worship failed to give sufficient weight to mitigating factors and placed undue weight on specific and general deterrence. It is also claimed that his Worship erred in not ordering the sentences to be served wholly concurrently. It is not put that a custodial sentence of itself was not justified.

[5] Dealing with the last of the grounds first, being the way counsel for the appellant addressed the issues, it should have been cast as an allegation of error for having ordered part of the sentences on the second set of charges to be served cumulatively on the first. The *Sentencing Act* 1995(NT) relevantly provides that unless otherwise ordered, where an offender has been sentenced to serve a term of imprisonment and is sentenced to serve another term of imprisonment for another offence, the terms are to be served concurrently (s 50). That is the usual rule. If a court wishes to depart from

it, regard must be had to that fact and consideration given to whether cumulative orders of imprisonment are justified in all the circumstances.

[6] The making of an order accumulating the whole or any part of sentences to terms of imprisonment is discretionary and must be exercised judicially (s 51). Unless reasons are given to depart from the rule, an appellate court is deprived of the benefit of the sentencing court's views as to why the order was made. No reasons were given in this case.

[7] The authority in this jurisdiction relied upon as relating to this issue is *R v Scanlon* (1987) 89 FLR 77. The result in that case must be seen against a background of it being a Crown appeal. It was decided prior to the commencement of the *Sentencing Act*. However, the authorities there referred to provide guidance to the principle, as a fundamental approach, to be taken when a person already sentenced to a term of imprisonment is sentenced to a further term. Within those parameters where is always room, of course, for the exercise of judicial discretion.

[8] In this case the stealing and falsification of documents, although separate and distinct offences, were committed in the course of a single transaction in the vast majority of cases. The falsified documents covered up for the stealing. Although quite properly charged as separately identifiable crimes, they together made up a single act of criminal conduct. The appellant was "truly engaged upon one multifaceted course of criminal conduct", in which case it is likely that a concurrent sentence will be just and convenient. What

must be achieved is a just sentence (*Attorney-General v Tichy* (1982) 30 SASR 84 and *R v Scanlon* per Nader J at p 85 quoting *Lade v Mamarika* (1986) 83 FLR 312 at 315-316). Notwithstanding the occasional variation in the overall criminal conduct on a few occasions, I see nothing to justify a departure from the concurrency rule.

[9] The appellant was the manager of the car yard and in a position of trust. He was 45 years of age and had no prior convictions. He was a family man with two young children and had a good work record as a mechanic and fireman in South Australia. He was injured in the course of his duties and retired from that job in 1995 when he commenced working as a car salesman.

[10] About two years before the offending commenced, he had started to develop a gambling habit and moved to Darwin with his family to try and avoid poker machines. He took up employment in the same line of business, but did not cease his gambling, again being attracted to the poker machines. All of the unrecovered stolen money and much of his income have been lost in that way. It is not suggested that the gambling addiction in any way lessens the seriousness of the offences or provides a mitigating circumstance for sentencing purposes. It simply explains why he did what he did.

[11] After being dismissed from his former employment, the appellant obtained a job as a truck driver which is said to be waiting for him after his release. Realising that the gambling addiction had brought him down, the appellant

went to Gamblers Anonymous and claims to have given it up before he was dealt with by his Worship. The appellant's family remains in Darwin.

[12] When interviewed by police the appellant exercised his right to silence, but after taking legal advice, indicated his intention to plead guilty. His Worship took that into account and noted his age and prior good character.

[13] Turning to consider the appropriate sentence, his Worship said nothing as to the appellant's prospects for rehabilitation, his cessation of gambling, family support and available job. He did not mention personal deterrence either, and it might be thought that he did not think that that was a weighty factor. Particular reference was rightly made to the need for general deterrence, especially for those in positions of trust.

[14] His Worship had been addressed on what might be regarded as comparative sentences and had done some additional work in that regard, which he mentioned in the course of his sentencing remarks. Counsel for the appellant now submits that his Worship became so involved in a mathematical exercise as to lose sight of the circumstances of the case before him.

[15] It is, of course, common practice for a sentencing tribunal to be provided with examples of sentences passed for offences under the same provisions. Given the differences between the circumstances of most offending, the best that can be hoped for is an indication of the range in which those sentences usually fall.

[16] I leave aside relatively minor offences which are committed in significant numbers where a “tariff” might be able to be established.

[17] For offences of this type the differing circumstances will tend over time to produce a range, but it may nevertheless be meaningless in individual cases.

[18] With all its limitations such an exercise can be helpful in avoiding disparity. I do not accept that because his Worship went to considerable effort in this part of his task, it can be held that on that account he overlooked other matters. I consider it to be highly unlikely that although not mentioning matters to which counsel for the appellant drew this Court’s attention, such as the appellant’s work history, family support and previous good character, a well experienced Magistrate would not have taken those factors into account.

[19] Counsel for the appellant next contends that his Worship erred in failing to give sufficient weight to the combination of mitigating circumstances, the plea of guilty, that he was a first offender, a person apparently of previous good character, the gambling explained his behaviour and there was no prospect that he would have escaped detection. It was also suggested that it was most unlikely that he would offend again, and that he had prior to the sentencing embarked upon an apparently successful course of rehabilitation. It might also be noted that he was ordered to repay the sum outstanding (see *Chaloner* (1990) 49 A Crim R, a decision of the Court of Criminal Appeal of New South Wales). That decision concerned circumstances in which the

usual, although not universal, punishment of custodial sentence could be avoided. However, I accept, with respect, that the notions conveyed in it can be as well applied in relation to the length of any proposed custodial sentence. Generally speaking, the more an offender has in his or her favour, the greater the mitigation of penalty which can properly be given. A person who has no relevant prior convictions and who pleads guilty, for example, could expect to be treated less severely than one who pleads guilty, but who has a bad record for like offending. However, the seriousness of the offending must also be brought into the balance, including, in a case like this, the number of offences and the period of time during which they were committed (*Napier v Samuels* (1972) 45 SASR 63 referred to by Mildren J in *Aoina v O'Brien* unreported, 13 January 1994).

[20] In *R v Bird* (1988) 56 NTR 17 at p33, the Court of Criminal Appeal provided the following guidance:

> "The matters to be taken into account and the approach in this jurisdiction to sentencing for offences involving breach of trust by employees are reasonably clear, but may conveniently be restated. In general, unless the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the usual and expected punishment in such cases. The sentence, and that part of it which is directed to be served, must be sufficiently substantial to indicate to the public the gravity of the particular offence. While the amount of money taken is not the only determinant of the length of sentence, it is a useful practical indicator. Where very large sums of money are taken, as here, a lengthy sentence of imprisonment is warranted. Other factors being equal, like defalcations should be dealt with by like sentences and more serious defalcations by heavier penalties; this satisfies the need for consistency in punishment, referred to by Mason J in *Lowe v R* (1984) 154 CLR 606 at 610-11; 54 ALR 193 at 196. Apart from the amount involved, other factors to be considered when imposing

> sentence include: the period over which the criminal enterprise was carried on – in this case a little over two years; and quality and degree of trust reposed in the accused by his employer, including the accused's position in the employer's organisation; the use to which the accused put the moneys – in this case, mainly gambling; the impact of the offence and sentence upon the accused's fellow-employees and the public – see the observations in *R v Steven* and *R v Green* (Schedule, *infra*); where relevant, the impact upon public confidence in the employer; the effect of the defalcation upon the employer; the effect of the sentence upon the accused; the history and personal circumstances of the accused and any matters of mitigation personal to him. Where the breach of trust is serious it is usually not appropriate to suspend any part of the sentence."

[21] The *Sentencing Act* was not in operation at that time, and I am unsure just what the court meant in the last remark. At that time the fixing of a non-parole period was discretionary, whereas now a minimum of 50% of the head sentence is mandated by s 54 of the Act, unless the sentence is suspended in whole or in part. It is still open to a court to suspend a sentence in whole or in part provided the head sentence is not more than five years (s 40).

[22] The relative merits of the parole or release on the suspended sentence in respect of a head sentence of not more than five years has not been the subject of any detailed analysis so far as I have been able to discern. The obvious distinctions lie in (a) the ability of the court to attach conditions to an order suspending a sentence, (b) which can continue beyond the period of the sentence, and (c) impose restraint upon further criminal offending for a period fixed in accordance with s 40 extending beyond the term of the sentence. Breach during the period so fixed can result in a offender being returned to prison. The offender is entitled to be released from prison under

the order suspending the sentence on the day specified by the order. In the case of parole, it is up to the Parole Board to decide whether the prisoner should be released on the day fixed by the court and to fix the conditions of release which only continue until the expiry of the term of imprisonment. Breach may lead to the parolee being returned to prison, and that is certain where the parolee has been convicted and sentenced to a term of imprisonment during the parole period.

[23] I do not think it is necessary, or indeed desirable, to proceed any further with this analysis in the absence of considered submissions to be applied in a particular case. I bear in mind, however, that a sentence suspended with conditions, and an operational period running beyond the date of expiry of the term of imprisonment, although possibly providing further protection to the community and assisting the offender by way of being an aid to rehabilitation, may place a significant burden and risk of breach followed by incarceration upon the offender.

[24] I consider that his Worship erred only in not permitting all sentences to run concurrently, and there will be an order allowing the appeal so as to quash the order accumulating the sentences to the extent of three months. It is open to impose a different sentence than that of the two years remaining, but I am not persuaded that it is excessive. The original sentences imposed are confirmed, an effective sentence of two years imprisonment.

[25] I fix the non-parole period of one year to commence at the expiry of 14 days after the commencement of the sentence on 29 July 1999.
